

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

New York Independent System Operator, Inc.)	Docket No.	ER21-1647-001
Central Hudson Gas & Electric Corporation)		
Consolidated Edison Company of New York, Inc.)		
Niagara Mohawk Power Corporation)		
New York State Electric & Gas Corporation)		
Orange and Rockland Utilities, Inc.)		
Rochester Gas and Electric Corporation)		

**REQUEST FOR REHEARING
OF WIRES**

Pursuant to Section 313 of the Federal Power Act (“FPA”)¹ and Rule 713 of the Rules of Practice and Procedure² of the Federal Energy Regulatory Commission (“Commission” or “FERC”), WIRES³ hereby respectfully submits this Request for Rehearing of the Order Rejecting Rate Filing issued in the above-captioned proceeding on September 3, 2021.⁴

I. INTRODUCTION

This proceeding involves the New York Transmission Owners’ (“NYTOs”)⁵ request pursuant to section 205 of the FPA⁶ to amend Attachment S to the New York Independent System Operator, Inc.’s (“NYISO”) Open Access Transmission Tariff (“OATT”) to adopt

¹ 16 U.S.C. § 825l.

² 18 C.F.R. § 385.713.

³ This filing is supported by the full supporting members of WIRES, but does not necessarily reflect the views of the RTO/ISO associate members of WIRES.

⁴ *New York Independent System Operator, Inc., et al.*, 176 FERC ¶ 61,143 (2021) (“September 3 Order”).

⁵ The NYTOs in this proceeding include: Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; Niagara Mohawk Power Corporation d/b/a National Grid; New York State Electric & Gas Corporation; Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation.

⁶ 16 U.S.C. § 824d.

prospectively a transmission owner option to fund mechanism for certain System Upgrade Facilities and System Deliverability Upgrades (“System Upgrades”) to their transmission systems driven by generator interconnections (“TO Funding Mechanism”).⁷ On September 3, 2021, the Commission rejected the NYTO’s section 205 filing on procedural grounds. In particular, the September 3 Order found that the NYTOs’ FPA section 205 filing rights under section 3.10(a) of the NYTOs’ Agreement with the NYISO⁸ do not afford the NYTOs the right to make an FPA section 205 filing to recover their costs in this instance. Commissioner Danly dissented, pointing out that the majority’s narrow interpretation of the NYTO’s FPA section 205 filing rights was inconsistent with the language of the rights expressly described in the NYISO-TO Agreement and was also contrary to well-established Commission and judicial precedent that waivers of statutory rights are not broadly construed. By narrowly confining the NYTOs’ description of reserved FPA section 205 filing rights, the Commission inferred a broad waiver by the NYTOs of their statutory rights.

As discussed herein, WIRES seeks rehearing of the September 3 Order. The Commission should reconsider its determination that the NYTOs have broadly waived their statutory rights and its decision to reject the NYTOs’ FPA section 205 rate filing on “procedural” grounds instead of addressing the merits of the proposal. Specifically, the Commission should respect the plain meaning of the NYISO-TO Agreement’s description of retained FPA section 205 filing rights, consider the filing on the merits, and allow the NYTOs an opportunity for full cost of service compensation – including return on and of investment – in connection with

⁷ See *The New York Transmission Owners*, Amendment to the NYISO OATT Adopting TO Funding Mechanism, Docket No. ER21-1647-000 (Apr. 9, 2021) (“section 205 Filing” or “Filing”).

⁸ NYISO, NYISO Agreements, Foundation Agreements, ISO-TO Agreement (0.0.0), § 3.10(a) (“NYISO-TO Agreement”).

System Upgrades, which are used and useful integrated parts of their transmission systems used to provide jurisdictional services. Furthermore, the Commission should reconsider its overly broad construction of the NYTOs' waiver of statutory rights that is implicit in its interpretation of section 3.10(a) of the NYISO-TO Agreement. The Commission wrongly construed and applied the term "costs" in section 3.10(a) as waiving cost of service recognition of the incremental risks incurred by owning, operating, maintaining, and otherwise being responsible for System Upgrades. This construction contravenes the record evidence and long-standing precedent.

II. SPECIFICATIONS OF ERROR AND STATEMENT OF ISSUES

In accordance with 18 C.F.R. § 385.713(c)(1) and (2), WIRES provides the following specifications of error and statement of issues, including citations to representative Commission and court precedent:

1. The Commission's decision to reject the NYTOs' filing under section 205 of the FPA to amend the NYISO OATT based upon the determination that the recovery of uncompensated risks associated with owning, operating, maintaining, and otherwise bearing responsibility for System Upgrades are not "costs" (i) fails to read the full text of section 3.10(c) of the NYISO-TO Agreement and is contrary to the plain meaning of both the specific provision and the broader purposes of that Agreement, (ii) conflicts with the Commission's own recent precedent that the NYISO-TO Agreement broadly reserves the NYTOs' rights under the FPA, (iii) is inconsistent with the NYISO OATT, and (iv) impermissibly presumptively waives FPA section 205 filing rights reserved to the NYTOs in the NYISO-TO Agreement.⁹
2. The Commission's decision not to allow an authorized return to address uncompensated risks associated with owning, operating, and maintaining, and otherwise being responsible for System Upgrades as a cost of service is in contravention of well-established Commission and judicial precedent supporting

⁹ See 5 U.S.C. § 706(2)(A). See also *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 26, 43 ("State Farm"); *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009); *Ameren Servs. Co. v. FERC*, 880 F.3d 571, 579-80 (D.C. Cir. 2018) ("Ameren"); *Ass'n of Oil Pipelines v. FERC*, 83 F.3d 1424, 1432 (D.C. Cir. 1996)

the NYTOs' filing to recover costs and earn a return on property used to provide jurisdictional service.¹⁰

III. REQUESTS FOR REHEARING

- A. The Commission should grant rehearing because the Commission's determination improperly waived rights held by the NYTOs to make the FPA section 205 filing, reflects a misreading of the NYISO-TO Agreement, and is contrary to the plain language of the NYISO-TO Agreement and inconsistent with the NYISO OATT.**

The NYISO-TO Agreement is clear that the NYTOs have broadly reserved their FPA rights and are entitled to recover all their costs of transmission services provided under the NYISO OATT, which necessarily includes an authorized return on the totality of the transmission system committed to providing FPA-jurisdictional transmission services.

Specifically, section 3.10(a) of the NYISO-TO Agreement provides:

Each Transmission Owner shall have the right at any time unilaterally to file pursuant to Section 205 of the Federal Power Act to change the ISO OATT, a Service Agreement under the ISO OATT, or the ISO Agreement to the extent necessary: (i) to recover all of its reasonably incurred costs, plus a reasonable return on investment related to services under the ISO OATT....

Thus, the NYISO-TO Agreement does not give the Commission discretion to reject a FPA section 205 filing seeking to recover all the NYTOs' costs of service for System Upgrades that are and will be used and useful for OATT transmission services. As noted by Commissioner Danly in dissent, the plain statutory text of section 3.10 of the NYISO-TO Agreement authorizes the NYTOs to file to amend the NYISO OATT to allow the adoption of NYTO funding so they are allowed to make the investment in System Upgrades and recover their costs plus a return.¹¹

¹⁰ See *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) (“*Hope*”); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 690 (1923) (“*Bluefield*”); *Ameren*, 880 F.3d at 579-80; *Midcontinent Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,075 at P 33 (2020).

¹¹ September 3 Order, Danly Dissent at PP 2-4.

The Commission's order in this proceeding departs, without recognition, from its own precedent that the NYISO-TO Agreement includes a broad reservation of rights,¹² which, rather than implying any waiver of rights to an authorized return, are designed to ensure that the NYTOs receive full cost of service treatment including earning an authorized return on owned transmission property, of all utility owned property committed to OATT service, including but not limited to System Upgrades. Through a series of steps, by (1) narrowly construing "costs" contrary to its plain meaning to include only those costs "properly recovered in transmission rates," (2) finding that "risks" incurred to operate and maintain the subject transmission facilities are not "costs" but rather are associated with the return on equity element of a jurisdictional rate, and (3) determining, contrary to the record evidence, that such risks are already appropriately compensated through a base return on rate base, the Commission has effectively waived the NYTOs' reserved section 205 filing rights. FERC lacks authority to limit those filing rights absent the express consent of the public utility. The NYTOs have not given the required consent.¹³

Moreover, by improperly restricting the NYTOs' filing rights under the FPA, the Commission fails to implement the plain meaning of section 25.5.4 of the NYISO OATT which provides:

Any Connecting or Affected Transmission Owner implementation and construction of (i) System Upgrade Facilities as identified in the Annual Transmission Baseline Assessment or Annual Transmission Reliability Assessment, or (ii) System Deliverability Upgrades as identified in the Class Year Deliverability Study, shall be in accordance with the ISO OATT, Commission-approved ISO

¹² *N.Y. Indep. Sys. Operator, Inc.*, 175 FERC ¶ 61,038, P 34 (2021).

¹³ See *Atlantic City Co., et al., v FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002) (quoting *City of Cleveland v. FPC*, 525 F.2d 845, 855 (D.C.Cir.1976)).

Related Agreements, the Federal Power Act and Commission precedent, and therefore *shall be subject to the Connecting or Affected Transmission Owner's right to recover, pursuant to appropriate financial arrangements contained in agreements or Commission-approved tariffs, all reasonably incurred costs, plus a reasonable return on investment.*¹⁴

The plain language of section 25.5.4 of the OATT clearly allows a NYTO to recover all reasonably incurred costs of service, including a reasonable return on System Upgrades. The Commission's erroneous interpretation of the NYTOs' filing rights under section 3.10 of the NYISO-TO Agreement correspondingly results in a failure to enforce section 25.5.4 of the OATT, violates the filed rate, and is arbitrary and capricious.

For the reasons described above, the Commission's rejection of the NYTOs' FPA section 205 filing is contrary to the plain language of section 3.10 of the NYISO-TO Agreement, or at a minimum an unreasonable interpretation of that provision, and results in the Commission's failure to enforce the filed rate under section 25.5.4 of the NYISO OATT.

B. The Commission should grant rehearing because the September 3 Order construes the meaning of "costs" in the NYISO-TO Agreement to exclude "risks" in contravention of governing precedent.

Court and Commission precedent clearly establish that a public utility must be afforded an opportunity to receive full cost of service compensation for FPA-jurisdictional services, which necessarily includes an opportunity to earn a reasonable rate of return for the risks and costs associated with its ownership, operation, and maintenance of network upgrades.¹⁵ On remand of *Ameren*, the Commission corrected its prior orders that directed transmission owners to fund network upgrades on a non-profit basis and to accept additional risk-bearing responsibility through the expansion of their network with zero return, in contravention of *Hope*

¹⁴ NYISO OATT, section 25.5.4 (emphasis added).

¹⁵ *Ameren*, 880 F.3d at 581.

and *Bluefield*. In doing so, the Commission ratified the D.C. Circuit’s observation that transmission owners do, in fact, have uncompensated risks associated with owning and operating transmission system upgrades driven by generation interconnections – which justifies inclusion of the value of those facilities in rate base.

Further reinforcing the point, the Commission, in fact, has recently reaffirmed this principle in a pleading before the D.C. Circuit:

[T]he Commission found that transmission owners do, in fact, ‘have at least some uncompensated risks’ when forced to operate network upgrades paid for through Generator Funding. This is consistent with the *Ameren* Court’s finding that ‘FERC’s precedents do not provide compensation for several classes of risks that [transmission owners] allege will accompany construction and operation of the network upgrade facilities.’ The existence of such uncompensated risk ‘supports [the transmission owners’] basic contention that they are entitled to be compensated *now* for operating the upgrades.’¹⁶

The NYTOs’ FPA section 205 filing would provide the opportunity to earn a rate of return on the capital costs associated with the interconnection upgrades, consistent with *Ameren*. This rate of return would ensure the NYTOs are compensated for the risks and costs associated with owning, operating, and maintaining interconnection upgrades driven by generator interconnections. A recovery of a rate of return on this basis is consistent with the precedent set in *Ameren*, the Commission’s pleading before the D.C. Circuit, and the *Hope* and *Bluefield* capital attraction standards. As the Commission’s rejection of the NYTOs’ filing cannot be reconciled with this precedent, it is arbitrary and capricious and should be reversed on rehearing.

¹⁶ Brief of Respondent Federal Energy Regulatory Commission, *ACPA v. FERC*, D.C. Cir. Case No. 20-1453, p. 43 (May 3, 2021) (citing Remand Rehearing Order at P 32) (citing *Ameren*, 880 F.3d at 581-82) (emphasis in original) (citations omitted) (quoting Remand Order at P 31 and *Ameren*, 880 F.3d at 583, respectively).

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, WIRES respectfully request that the Commission grant rehearing of its September 3 Order.

Respectfully submitted,

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October 4, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 4th day of October 2021.

/s/ Larry Gasteiger

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